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IN THE

Supreme Court of the United States

GARY LOCKE, *et al.*,
Petitioners,
v.
JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND HISTORIANS AND LEGAL SCHOLARS IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND HISTORIANS AND LEGAL SCHOLARS IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI*

The Becket Fund for Religious Liberty respectfully submits this brief of *amici curiae* on behalf of itself, the Catholic League for Religious and Civil Rights, and various historians and legal scholars in support of Respondent pursuant to Rule 37.3 of this Court.[1]

The Becket Fund for Religious Liberty is a bi-partisan, interfaith, public-interest law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people in public life and public benefits. Accordingly, the Becket Fund has previously filed two *amicus* briefs before this Court regarding the history of the federal and state Blaine Amendments and has been actively involved in lower court litigation challenging state

[1] All parties have consented to the filing of this brief. A consent letter from Respondent is on file with the Court. A consent letter from Petitioners is being filed concurrently with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

Blaine Amendments, including Washington's.[2]

The Catholic League for Religious and Civil Rights is the nation's largest Catholic civil-rights organization. The League's headquarters is in New York City; its cooperating affiliates across the Country assist in activities national in scope. The Catholic League aims – among other things – to expose and correct stereotypes of Catholic belief and of the Church in the media, in popular culture, and in government actions. In this way, the League seeks not only to promote accurate understanding of history, but also to protect individual Catholics as well as the Church against defamation and discrimination.

Amici also include several prominent legal and religious historians and legal scholars, whose names and institutional affiliations (for identification purposes only) are listed in Appendix A. Among these *amici* are authors of some of the leading – indeed, definitive – accounts of the social, historical, and religious context provided in this brief.[3] They have joined in this submission to ensure

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[2] *See* Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners (Nov. 9, 2001) (*Zelman v. Simmons-Harris,* Nos. 00-1751, 00-1777, 00-1779) (available at www.becketfund.org/litigate/zelmanamicus.pdf); Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners (Aug. 19, 1999) (*Mitchell v. Helms,* No. 98-1648) (available at www.becketfund.org/litigate/mitchell.pdf). *See also* Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Reversal (Apr. 12, 2001) (*Gallwey v. Grimm,* Wash. S. Ct. No. 68565-7) (available at www.becketfund.org/ litigate/gallweyamicus.pdf); *Pucket v. Rounds,* (D.S.D. filed Apr. 23, 2003); *Boyette v. Galvin,* No. 98-CV-10377 (D. Mass. filed Mar. 3, 1998).

[3] *See, e.g.,* GERARD BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA: 1776-1787 (1977); CHARLES L. GLENN, THE MYTH OF THE COMMON SCHOOL (2002); PHILIP JENKINS, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE (2003); GEORGE M. MARSDEN, RELIGION AND AMERICAN CULTURE (2000); WARD M. MCAFEE, RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870'S (1998); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM (2003); WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION 1917-1927 (1994); JOSEPH

that the Court's analysis proceeds from, and is built upon, historically accurate premises and accounts. In particular, the goal of these historians and scholars is to urge the Court not to embrace the misleading and incomplete revisionist account, supplied by several of Petitioners' *amici,* of the Blaine Amendments and of America's experiences with nativism and anti-Catholicism.

SUMMARY OF THE ARGUMENT

The Washington State law at issue in this case disqualifies a student from an otherwise available government benefit, only because the student would use the benefit for a religious purpose. That is the core constitutional offense identified by the court below, and this Court may affirm on that basis alone.

But laws that single out the religious generally – or those of a particular religion – for exclusion from government educational benefits are widespread in this country and share a common and pernicious heritage. Though this tradition of religious discrimination is unfortunately long-standing, it does not originate with James Madison, Thomas Jefferson, or any other framers of the federal constitution. Instead, it emerged with force about a half-century later as part of a broader cultural movement reacting against a growing religious minority, whose controversial beliefs directly threatened the dominant religious ideology of the day. American nativism succeeded not only in backing its hostility to Catholic immigrants (and especially their schools) with the force of law, but in cloaking that hostility with the rhetoric of religious freedom and the authority of the founders. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (Harvard 2002).

This perversion of the great American tradition of religious freedom must end now. This case presents the Court with the opportunity to expose it and condemn it, once and for all – to tear out, root and branch, the state constitutional provisions that have enforced religious discrimination in the funding of education for well over a century.

P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999); JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (1999).

Two *amicus curiae* briefs in support of Petitioners represent what should be the last gasps of this dying tradition. The first asks the Court to cast aside the historical conclusions of a majority of its sitting members – and the broad consensus of historians and legal scholars – regarding the nativist purpose of the federal Blaine Amendment, and its state forerunners and progeny, including the Washington Blaine Amendment. The second brief freely acknowledges that hostility to certain Catholic beliefs animated the Blaine Amendments but – astonishingly – asks this Court to legitimize that hostility. As set forth below, both arguments are untenable and should be rejected.

ARGUMENT

I. THE ORIGINAL BLAINE AMENDMENT AND ITS STATE-LEVEL PROGENY, INCLUDING THE WASHINGTON PROVISION AT ISSUE HERE, WERE ANIMATED BY RELIGION-BASED HOSTILITY AND FEAR.

A. The Decisions of This Court Establish Conclusively That the Federal and State Blaine Amendments Were Animated by Nativism.

Seven Justices now sitting on this Court have already acknowledged that nativism was the driving force behind both the federal Blaine Amendment and its state progeny. That acknowledgement has come in two different opinions in two different cases, and those opinions suggest different views of the *legal consequences* of that historical fact. But the underlying history has nonetheless been acknowledged by a majority of this Court, and so is already established in its jurisprudence.

In *Mitchell v. Helms,* 530 U.S. 793 (2000), the four Justice plurality opinion both acknowledged and condemned the nativism that led to the federal and state Blaine Amendments. *See id.* at 828-29 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). In rejecting the Court's prior use of the term "sectarian" in Establishment Clause jurisprudence, the opinion explained that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." The opinion

continued:

> Opposition to aid to "sectarian" schools acquired prominence in the 1870s with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." *See generally* Green, *The Blaine Amendment Reconsidered,* 36 Am. J. Legal Hist. 38 (1992).

Mitchell, 530 U.S. at 828. The plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs" – precisely the purpose and effect of the Blaine Amendments – represented a "doctrine, born of bigotry, [that] should be buried now." *Id.* at 829.

Two years later, in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), three Justices provided a detailed account of the relevant history in dissent. *See id.* at 720-21 (dissenting opinion of Breyer, J., joined by Stevens and Souter, JJ.). Specifically, they recognized that the Blaine Amendment movement was a form of backlash against "political efforts to right the wrong of discrimination against religious minorities in public education." *Id.* at 721.

> [H]istorians point out that during the early years of the Republic, American schools – including the first public schools – were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. *See, e.g.,* D. Tyack, *Onward Christian Soldiers: Religion in the American Common School, in History and Education* 217-226 (P. Nash ed. 1970). Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict. *See* Kosmin & Lachman, [*One Nation Under God: Religion in Contemporary American Society*] 45 [(1993)] (Catholics constituted less than 2% of American church-affiliated population at time of founding).

Zelman, 536 U.S. at 720. The Justices recounted how the wave of Catholic and Jewish immigration starting in the mid-19th Century increased the number of those suffering from this discrimination, and so the intensity of religious hostility surrounding the "School Question":

> Not surprisingly, with this increase in numbers, members of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools. Scholars report that by the mid-19th century religious conflict over matters such as Bible reading "grew intense," as Catholics resisted and Protestants fought back to preserve their domination. Jeffries & Ryan, [*A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279,] 300 [(Nov. 2001)]. "Dreading Catholic domination," native Protestants "terrorized Catholics." P. Hamburger, *Separation of Church and State* 219 (2002). In some States "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds ... rioted over whether Catholic children could be released from the classroom during Bible reading." Jeffries & Ryan, 100 Mich. L. Rev., at 300.

Zelman, 536 U.S. at 720-21. Finally, the Justices detailed how Catholic efforts to correct this increasingly severe discrimination elicited a reaction in the form of the proposed federal Blaine Amendment and its successful state progeny:

> Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter, scholars report, "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic.)" [Jeffries & Ryan] at 301. And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for "sectarian" (*i.e.*, Catholic) schooling for children. [Jeffries & Ryan] at 301-305. *See also*

Hamburger, *supra*, at 287.

Zelman, 536 U.S. at 721.

Thus, according to seven Justices of this Court, the federal and state Blaine Amendments excluded "sectarian" schools from equal participation in government educational funding as a way to target for special disadvantage Catholics and other growing religious minorities, in fearful reaction to their refusal to conform with "nonsectarian" Protestantism.

To be sure, the plurality in *Mitchell* and the dissent in *Zelman* disagree sharply on the *legal consequences* of this history. The *Mitchell* plurality concluded that, because the exclusion of "sectarian" schools from government funding originated in the same hostility to Catholics expressed in the Blaine Amendments, and because that exclusion continues to impose special disadvantages on Catholics even to this day, the exclusion is unconstitutional and should be repudiated. *See Mitchell,* 530 U.S. at 829. *See also Hunter v. Underwood,* 471 U.S. 222 (1985). The *Zelman* dissent concluded that, although the Blaine Amendments' exclusion of "sectarian" schools from government funding targeted Catholics in reaction to their refusal to assimilate, and although that exclusion may have been discriminatory, Catholics' resistance to that discrimination represented religious strife that demonstrates the need to deny government funding to all religious schools. *Zelman,* 536 U.S. at 721-23. *See also* Lupu & Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles,* 78 NOTRE DAME L. REV. 917, 954-55 & n.170 (May 2003) (discussing historical conclusions in Breyer dissent).

But disagreement on the *legal consequences* of the underlying history does not alter the fact that a solid majority has agreed on the underlying history. Notwithstanding other differences, it remains that seven Justices agree that by excluding "sectarian" schools from government funding, the federal and state Blaine Amendments were designed to exclude Catholic and other religious minority schools, and that this targeting came in hostile reaction to their growing numbers and resistance to Protestant hegemony. Therefore, these historical conclusions should not be disrupted.

B. A Large and Growing Historical Record Establishes Conclusively That the Federal and State Blaine Amendments Were Animated by Nativism.

The recent historical conclusions of this Court merely summarize a long-established but growing historical record documenting the pervasive role of nativism in debates over the "School Question" in the United States. As set forth more fully below, the "common schools" were founded in substantial part to promote the teaching of – and to entrench the dominant position of – the "common religion" of "nonsectarian" Protestantism. When Catholics and other religious minorities threatened that dominance by growing in numbers and resisting religious assimilation, the result was a nativist movement that urged the passage of laws – including the federal Blaine Amendment and similar state laws that targeted "sectarian" schools for special disadvantage – to enforce the movement's hostility to these religious newcomers. Washington State's constitutional exclusion of "sectarian" schools from government educational funding is a classic example.

1. Nineteenth Century "Common Schools" Inculcated the Protestant "Common Religion," Thus Distinguishing Themselves from "Sectarian" Schools.

In the Northeastern States, the birthplace of the "common school," there was an ongoing religious debate in the 19th Century between the Unitarian and Trinitarian divisions of the Congregational faith. *See, e.g., Hale v. Everett*, 53 N.H. 9, 111 (1868) ("the great mass of our people . . . were Congregationalists . . . . Such was their Christianity and their Protestantism, as was that of most of the New England states"). *See also The Dublin Case*, 38 N.H. 459 (1859) (describing history of the Congregational Church and conflicts between the Unitarians and Trinitarian/Orthodox in New England). A desire to make peace between these factions, together with the emerging principle of universal education, led to the creation of "nonsectarian common schools," first in Massachusetts and then elsewhere.

But "nonsectarian" in this sense did not mean nonreligious. The term referred to schools that taught religious doctrine acceptable

initially to all Congregationalists, and, later, to most Protestants.[4] When Horace Mann developed his system of common, nonsectarian schools, the conflict he addressed was that between Trinitarian and Unitarian Congregationalists.[5] E.I.F. WILLIAMS, HORACE MANN: EDUCATIONAL STATESMAN 266 (1937); *see also* R. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL 69 (1970) ("Horace Mann scorned sectarianism. By that he meant chiefly the sectarianism of the evangelical Protestant denominations.").

Indeed, during this period, the Justices of this Court defined "sectarian" in relation to a benchmark of nondenominational Protestantism. In *Vidal v. Girard's Ex'rs*, 43 U.S. 127 (1844), Justice Story asked rhetorically, in response to the assertion that Christianity could not to be taught by laymen in a college:

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[4] "Our fathers were not only Christians; they were, even in Maryland by a vast majority, elsewhere almost unanimously, Protestants." *Hale*, 53 N.H. at 111 (quoting 2 Bancroft's Hist. U.S. 456). *See also Stevenson v. Hanyon*, 7 Pa. Dist. R. 585, 589 (1898) ("Christianity is part of the common law of this State [Pennsylvania]"); *Warde v. Manchester*, 56 N.H. 508, 509 (1876) ("[T]he protestant religion is regarded with peculiar favor . . . .").

[5] Responding to the charges that he sought the removal of religion, and the Bible in particular, from the common schools, Mann issued a statement on "Religious Education" in his Report on Education for 1848:

> But it will be said that this grand result in practical morals is a consummation of blessedness that can never be attained without religion, and that no community will ever be religious without a religious education. Both these propositions I regard as eternal and immutable truths.

HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-1848, at 292 (1891). Thus, the "Father of Public Education" himself vehemently denied that he "ever attempted to exclude religious instruction from school, or to exclude the Bible from school, or to impair the force of that volume." *Id.* at 311. Instead, he describes the public school system at that time as building "its morals on the basis of religion; it welcomes the religion of the Bible." *Id.* Mann welcomed religion in the common schools—so long as it was of the "common," "non-sectarian" variety.

> Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, *not sectarian,* upon the general evidence of Christianity, from being read and taught in the college by lay-teachers? . . . . Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?

Id. at 200 (emphasis added). Thus, even this Court took for granted the proposition that, in 1844, the "common religion" was not sectarian. Other religions were.

2. Nativist Hostility to European Immigrants and Their Religions Produced Fierce, Organized Opposition to "Sectarian" Schools, Culminating in the Movement to Pass the Federal and State Blaine Amendments.

Between 1830 and 1870, the common-school movement coincided with a surge in Irish, German, and other European Catholic and Jewish immigrants, and a corresponding backlash – one that lasted well into the 20th Century – against those immigrants and their religions. This backlash formed the basis of organized nativist movements that thrived on Protestant fears of the immigrants' cultures and faiths, and that expressed their hostility in law, including the Blaine Amendments.

One of the earliest and most prominent nativist groups was the Know-Nothing party, which "included in its platform daily Bible reading in the schools." *Lemon v. Kurtzman*, 403 U.S. 602,629 (1971) (citation omitted). Abraham Lincoln wrote of that party:

> As a nation we began by declaring that 'all men are created equal.' We now practically read it, 'all men are created equal, except Negroes.' When the Know-Nothings get control, it will read 'all men are created equal except Negroes and foreigners and Catholics.' When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty.

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (R. Basler ed., 1953).

This was not a fringe movement. In Massachusetts, the Know-Nothing party swept the elections of 1854, gaining the governorship, the entire congressional delegation, all forty seats in the Senate, and all but 3 of the 379 members of the House of Representatives. JOHN R. MULKERN, THE KNOW-NOTHING PARTY IN MASSACHUSETTS 76 (1990). Armed with this overwhelming mandate, they turned quickly to what Governor Henry J. Gardner called the mission to "Americanize America." *Id.* at 94. The Know-Nothings required the reading of the King James Bible in all "common" schools; they proposed constitutional amendments (which passed both houses of the legislature) that "would have deprived Roman Catholics of their right to hold public office and restricted office and the suffrage to male citizens who had resided in the country for no less than twenty-one years"; they dismissed Irish state-government workers; and they banned foreign-language instruction in the public schools. *Id.* at 102. The official bigotry is perhaps best—and comically—illustrated by the removal of a Latin inscription above the House Speaker's desk, and the establishment by the legislature of a "Joint Special Committee on the Inspection of Nunneries and Convents." *Id.* at 102-103. This Committee was charged with liberating women thought to be captive in convents and stamping out other "acts of villainy, injustice, and wrong . . . perpetrated with impunity within the walls of said institutions." *Id.* at 103.

Of particular interest here is the fact that the Know-Nothings succeeded in adding an amendment to the Massachusetts Constitution which had been proposed and narrowly rejected by the people one year before: "[M]oneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools . . . shall never be appropriated to any religious sect for the maintenance exclusively of its own schools." MASS. CONST. amend. art. XVIII (superseded by MASS. CONST. amend. art. XLVI). *See* MULKERN, at 54-56, 79, 105-106. The amendment's proponents were open about their motives. *See, e.g.,* OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION ASSEMBLED MAY 4, 1853

TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, Vol. II, at 630 ("[I]f gentlemen say that the resolution has a strong leaning towards the Catholics, and is intended to have special reference to them, I am not disposed to deny that it admits of such interpretation.") (Mr. Lothrop).

Nor were nativist sentiments and outbursts confined to Massachusetts. The understanding of "nonsectarianism" as "lowest common denominator" Protestantism also led, for example, to a telling battle in Cincinnati between the "common religionists" and a group of Catholics, Jews, and freethinkers that opposed Protestant devotional Bible reading. *See Board of Educ. v. Minor*, 23 Ohio St. 211 (1872). Protestant opposition to the removal of "their" Bible from the public schools was fierce and virulently anti-Catholic. *See* MICHAELSEN, *supra*, at 118 ("[T]he Dutch Reformed *Christian Intelligencer* denounced the Cincinnati board's action as a move to 'hand the public schools over to Pope, Pagan, and Satan.'").

Resistance to religious assimilation through the "common schools" gave rise to a similarly hostile reaction elsewhere as well, including deadly riots in Philadelphia, where nativist mobs burned Catholics' homes, churches and seminaries. JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 40 (Norton 2003); MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 275-76 (Penguin 1985).

The tax-funded public schools were the weapon of choice for nativists in New York City as well. *See Lemon,* 403 U.S. at 628 (Douglas, J., concurring) ("Early in the 19th century the Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible."); MICHAELSEN at 85 ("But in certain practices – such as the use of the King James version of the Bible and certain other literature – the society gave a definite Protestant and even anti-Catholic tone to education under its direction."); DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 50-52 (1974). Resistance again gave rise to conflict, but Bishop John Hughes stationed armed men around churches to avoid losses similar to those in Philadelphia. *See* MARTY, at 276.

Soon enough, the movement to exclude Catholics from educational funding using the legal term "sectarian" appeared on the national stage in the form of the federal "Blaine Amendment." Blaine Amendments take their name from Representative James G. Blaine, who in 1875, introduced in the U.S. House of Representatives a proposed constitutional amendment that would have barred states from giving school funds to "sectarian" schools.[6] Although the Blaine language narrowly failed as a federal constitutional amendment,[7] it had gained enough support that Congress thereafter required new states – including Washington State – to adopt similar language in their state constitutions as a condition of admittance to the Union.[8] Other states voluntarily adopted constitutional

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[6] LLOYD JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, at 138-139 (1987). The amendment read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Id.

[7] The measure passed in the House by a margin of 180-7, 4 CONG. REC. 5191 (1876), but fell four votes short of a supermajority in the Senate. 4 CONG. REC. 5595 (1876).

[8] *See, e.g.*, Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling act for North Dakota, Montana, South Dakota, and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling act for Arizona and New Mexico); Act of July 3, 1890, 26 Stat. 215 § 8, ch. 656 (1890) (enabling act for Idaho); S.D. CONST. art. VIII § 16; N.D. CONST. art. 8 § 5; MONT. CONST. art. X § 6; WASH. CONST. art. IX § 4, art. I § 11; ARIZ. CONST. art. IX § 10; IDAHO CONST. art. X § 5. *See also* 20 CONG. REC. 2100-01 (1889) (statement of Sen. Blair) (arguing in favor of Enabling Act requirement that state constitutions guarantee "public schools . . . free from sectarian control," in part because requirement would accomplish purposes of failed federal Blaine Amendment). The fact that a Blaine Amendment was effectively forced on the State of Washington lends an especially hollow ring to the Petitioners' and various *amici's* repeated expressions of concern over "federalism" and "play in the joints." *See* Conklin & Vaché, at 441-42

amendments containing similar language as part of the same movement.[9] *See* HAMBURGER, at 335 ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states."); VITERITTI, at 153. *See also* Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 43 (1992) (by 1876 fourteen states had enacted legislation prohibiting the use of public school funds for religious schools; by 1890 twenty-nine states had adopted constitutional requirements along the same lines).

Many prominent people threw their weight behind the effort. Calling for an end to all funding for "sectarian" schools in 1875, President Grant referred to the Catholic Church as a source of "superstition, ambition and ignorance." President Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (quoted in Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 51 (1997)). *See* MCGREEVY, at 91-92 (discussing importance of Grant's speech launching federal Blaine Amendment); VITERITTI, at 152-53 (same).

Institutions were formed to fight Catholic interference with the Protestant public school system. *See, e.g., Derry Council, No. 40, Junior Order United American Mechanics v. State Council of Penn.*, 47 A. 208, 209 (Pa. 1900) (among purposes of the Junior Order of United American Mechanics were "to maintain the public-school system of the United States, and to prevent sectarian interference therewith; to uphold the reading of the Holy Bible therein"). A succession of anti-Catholic organizations continued efforts to oppose Catholic education and influence using the various tools of the state legislature, Congress, and the judiciary. In the 1890s, the "American Protective Association" was politically successful in inciting anti-

(concluding that "realistically, there was no choice" for citizens of Washington whether to include some form of the Blaine Amendment).

[9] *See, e.g.*, N.Y. CONST. art. XI § 3 (adopted 1894); DEL. CONST. art. X § 3 (adopted 1897); KY. CONST. § 189 (adopted 1891); MO. CONST. art. IX § 8 (adopted 1875).

Catholic hatred.[10]

3. Early Judicial Interpretations of the Various State Blaine Amendments Confirmed and Effectuated Their Nativist Purpose.

Early litigation under the Blaine Amendments should remove any doubt that, by excluding "sectarian" schools from government funding, the amendments were meant to target Catholics and other religious newcomers for special disfavor. State Blaine Amendments and similar provisions were frequently used to strike down programs such as payment for orphans at a Catholic asylum, *Nevada ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882), payment for tuition at an "industrial school for girls," *Cook Cy. v. Chicago Indus. Sch. for Girls*, 18 N.E. 183 (Ill. 1888), and provision of textbooks and other supplies for parochial school students, *Smith v. Donahue*, 195 N.Y.S. 715 (N.Y. App. Div. 1922).

When Catholic children attending public schools complained about the Protestant doctrine taught there, their charges went unanswered by the courts. While the Catholic Church forbade its faithful from reading the King James version of the Bible,[11] courts

[10] Oath No. Four of the APA began:

> I do most solemnly promise and swear that I will always, to the utmost of my ability, labor, plead and wage a continuous warfare against ignorance and fanaticism; that I will use my utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from the hampered and bound consciences of a priest-ridden and church-oppressed people; that I will never allow any one, a member of the Roman Catholic Church, to become a member of this order, I knowing him to be such; that I will use my influence to promote the interest of all Protestants everywhere in the world that I may be; that I will not employ a Roman Catholic in any capacity if I can procure the services of a Protestant.

HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH 36 (1912); *See also* DONALD L. KINZER, AN EPISODE IN ANTI-CATHOLICISM 139 (1964).

[11] As the California Supreme Court described the religious differences between the King James (Protestant) and Douai (Catholic) versions of the Bible:

continued to hold that the reading of that translation was *not* sectarian instruction. *See People ex rel. Vollmar v. Stanley*, 255 P. 610, 617 (Colo. 1927) ("It is said that the King James Bible is proscribed by Roman Catholic authority; but proscription cannot make that sectarian which is not actually so."), *overruled by Conrad v. City of Denver*, 656 P.2d 662 (Colo. 1983).

Other courts were more candid about their intent to keep Protestant religious instruction in the public schools, and "sectarian" ideas out. After rejecting a claim under the state's Blaine Amendment challenging Bible reading and prayer in public school, the Iowa Supreme Court suggested that "the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible." *Moore v. Monroe*, 20 N.W. 475, 475-76 (Iowa 1884). But in a later decision, the same court found a constitutional violation where a school district provided funds to a public school operating in the same building as a Catholic parochial school. *Knowlton v. Baumhover,* 166 N.W. 202, 214 (Iowa 1918). *See also Kaplan v. Indep. Sch. Dist.*, 214 N.W. 18, 20 (Minn. 1927) (upholding Bible reading, and adding, "[w]e are not concerned with nice distinctions between sects, nor as to how among them the different authorized versions of the Bible are regarded."); *Nevada ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 385 (1882) ("The framers of the [Nevada] constitution undoubtedly considered the Roman Catholic a sectarian church."). *Cf. Donohoe v. Richards,* 38 Me. 379 (1854) (affirming dismissal of lawsuit by 15-year old girl expelled from public school for refusing to read the King James Version, noting that "[l]arge masses of foreign people are among us . . [who must] imbibe the liberal spirit of our laws and institutions," and concluding that "the process of assimilation [cannot] be so readily and thoroughly accomplished as through the medium of the public schools.").

The Douai version is based upon the text of the Latin Vulgate, the King James version on the Hebrew and Greek texts. There are variances in the rendering of certain phrases and passages. The Douai version incorporates the Apocrypha, which are omitted from the texts of the Testaments in the King James version.

Evans v. Selma Union High School Dist., 222 P. 801, 802-03 (Cal. 1924). *See also State ex rel. Finger v. Weedman,* 226 N.W. 348, 350-53 (S.D. 1929) (discussing conflict between Catholics and Protestants over Bible reading); *People ex rel. Ring v. Board of Educ. of Dist. 24,* 92 N.E. 251, 254 (Ill. 1910) ("Catholics claim that there are cases of willful perversion of the Scriptures in King James' translation.").

The claims of a group of Catholics and Jews against a public school board that conducted religious exercises, including the reading of the King James Bible and recitation of the Lord's Prayer, were dismissed when the Texas Supreme Court held that such exercises did not render the school sectarian. *Church v. Bullock*, 109 S.W. 115, 118 (Tex. 1908) ("Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the Constitution prohibits reading the Bible, offering prayers, or singing songs of a religious character in any public building of the government would produce a condition bordering upon moral anarchy.").

The Kansas Supreme Court held that the reading of the Lord's Prayer and the Twenty-Third Psalm did not constitute "sectarian or religious doctrine," arguing that the public schools had an obligation to teach morals and ideals to its students, and "the noblest ideals of moral character are found in the Bible." *Billard v. Board of Educ.*, 76 P. 422, 423 (Kan. 1904).

Similarly, daily religious services at a Methodist College were held by the Kentucky Court of Appeals not to constitute "sectarian instruction." *Commonwealth v. Board of Educ. of Methodist Episcopal Church*, 179 S.W. 596, 598 (Ky. 1915). *See also Hackett v. Brooksville Graded Sch. Dist.*, 87 S.W. 792, 793 (Ky. 1905).

The Nebraska courts also applied the term "sectarian" to allow Protestant instruction in the public schools. *See State v. Scheve*, 93 N.W. 169, 172 (Neb. 1903) (overruling motion for rehearing) (constitutional prohibition against sectarian instruction "cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the state."); *Tash v. Ludden*, 129 N.W. 417, 421 (Neb. 1911) ("This is a Christian country, Nebraska is a Christian state, and its normal schools are Christian schools; *not sectarian*, nor

what would be termed religious schools; . . . .") (emphasis added).

At the same time, objecting students were not excused from "nonsectarian" religious exercises. *See, e.g.*, *McCormick v. Burt*, 95 Ill. 263 (1880) (affirming judgment against Catholic plaintiff who was suspended for not observing Bible reading rule); *Spiller v. Inhabitants of Woburn*, 12 Allen 127 (Mass. 1866) (upholding student's "exclusion" from school for refusing to bow her head during public school prayer). *Cf. North v. Board of Trustees of Univ. of Illinois*, 27 N.E. 54 (Ill. 1891) (holding that mandatory chapel exercises, the avoidance of which resulted in the expulsion of the plaintiff from the State university, did not violate the Illinois constitution).

This pattern of application serves only to confirm what the language and history of the Blaine Amendments already make clear: that the term "sectarian" was code for "Catholic," and that laws excluding "sectarian" schools and their students from government benefits – like the federal and state Blaine Amendments – were designed to target Catholics for special disfavor.

4. Washington's Blaine Amendment Is Typical of State Laws That Target "Sectarian" Religious Groups for Special Disfavor.

The Washington Constitution is no exception to the broader pattern of state constitutions containing provisions designed specially to disadvantage Catholics in the area of education. The Washington Blaine Amendment, like the federal Enabling Act that required it, contains the tell-tale "sectarian" category that was characteristic of Blaine Amendments nationwide.[12] Even on its face, the term

[12] *Compare* WASH. CONST. art. IX § 4 ("All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."), *with* Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (requiring Washington to maintain "public schools … free from sectarian control"), *and with* 4 CONG. REC. 205 (1875) ("no money raised by taxation in any State for the support of schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect"). *See also* VITERITTI, at 152-53 ("The Washington Constitution is a direct descendent of the Blaine Amendment."); Utter & Larson, 15 HASTINGS CONST. L.Q. at 468 ("The language of the

"sectarian" connotes fewer than all religious groups as its target, and the long history of its usage since the mid-19th Century (as discussed at length above) clarifies that Catholics were especially targeted.

Moreover, the only documentation of state-level debates over the Washington Blaine Amendment reinforces the conclusion that it was passed for an illicit purpose. Specifically, the framers of Article IX, Section 4 considered and rejected both replacing the term "sectarian" with the term "religious," and excluding "religious exercises or instructions" entirely from public schools. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 329, 689 (B. Rosenow ed. 1999). Thus, the framers followed the consistent pattern of preserving "nonsectarian" Protestant worship in government funded schools, while denying that same funding to unnamed – but well-known – "sectarian" groups. *See* Utter & Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 478 (1988) ("In distinguishing between religion and sectarianism, the framers [of art. IX § 4] comported with the fifty-year-old common school movement . . . [which] was natural for a convention dominated by Blaine Republicans and influenced by the Enabling Act's public school provisions."). *See also* Frank J. Conklin and James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution – A Proposal to the Supreme Court*, 8 UNIV. PUGET SOUND L. REV. 411, 436-40 (1985) (discussing "convergence of anti-Mormon and anti-Catholic sentiment in the Washington Constitution").

Thus, Washington State's Blaine Amendment, like its failed federal predecessor, targets "sectarian" instruction for exclusion from government educational funding in order to entrench "nonsectarian" Protestantism and to hobble its competitors, especially Catholicism.

state constitution's establishment clauses is similar to that found in the Blaine Amendment."); Katie Hosford, *The Search for a Distinct Religious-Liberty Jurisprudence Under the Washington State Constitution*, 75 WASH. L. REV. 643, 650 (2000) ("[T]he Washington Constitution's religion provisions derive from essentially the same intentions as those behind the Blaine and Blair proposed amendments to the U.S. Constitution.").

C. The Grossly Incomplete Historical Account of Certain *Amici* Does Nothing to Undermine the Conclusion that Nativism Animated the Federal and State Blaine Amendments.

Certain *amici* labor mightily to avoid or obfuscate these basic historical propositions. *See generally* Brief *Amicus Curiae* of Historians and Law Scholars on Behalf of Petitioners (hereinafter "Americans United Br." or the "Brief").[13] For the reasons set forth below, this Court should reject both the overall approach and particular arguments of the Brief.

1. *Amici's* Competing Account Is Marked by Glaring Omissions.

Before addressing its particular arguments, present *amici* note a series of large-scale oversights in the Brief. First, it completely ignores the fact that seven Justices have already accepted the basic historical propositions that it would challenge. *See supra* Section I.A. It makes no mention of the *Zelman* dissent and states inaccurately that the *Mitchell* plurality reached its conclusions "without the benefit of briefing on this subject." Americans United Br. at 4. *But see* Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners (filed in *Mitchell v. Helms,* No. 98-1648, Aug. 19, 1999) (available at www.becketfund.org/litigate/mitchell.pdf).

Second, the Brief either ignores entirely or gives short shrift to the recent historical works that confirm – and, in some cases, have already informed – the conclusions of this Court regarding the prominent role of nativism in disputes over school funding. *See, e.g.,*

[13] Although Americans United for Separation of Church and State ("AU") funded the brief of "Historians and Law Scholars," and although counsel of record on the brief was AU's General Counsel from 1992 to 2001, AU is not listed as an *amicus*. *See* Americans United Br. 1 n.1. Present *amici* note that the when AU was founded in 1947, its original name was Protestants and Other Americans United for Separation of Church and State, and that one of its attorneys was the notorious anti-Catholic polemicist Paul Blanshard. *See* PHILIP JENKINS, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE 39 (2003). *See also* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 451-52, 470-72 (2003).

PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (Harvard 2002); JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (Brookings 1999); CHARLES L. GLENN, JR., THE MYTH OF THE COMMON SCHOOL (U. Mass. 1988); WARD M. MCAFEE, RELIGION, RACE AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S (S.U.N.Y. 1998); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y 551 (Spring 2003); John Jeffries & James Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (Nov. 2001); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000). *See also* PHILIP JENKINS, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE (Oxford 2003); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM (Norton 2003). *But see* Americans United Br. at 4 n.3, 18 n.47 (citing briefly but otherwise ignoring books by Hamburger, Viteritti, and Glenn).

Third, the Brief takes no account of the history of application and judicial interpretation of the state Blaine Amendments. *See supra* Section I.B.3. This evidence – which remains wholly unanswered – serves only to confirm that by excluding "sectarians" from government educational funding, the amendments sought mainly to exclude Catholics.

2. *Amici's* Competing Account Is Inconsistent in Its Treatment of Remarks by Individuals.

The Brief alternately places too much and too little emphasis on the comments of individuals in assessing the purpose of the Blaine Amendments. A single remark by an individual, *by itself,* typically has little evidentiary value in proving the existence of a broader cultural or legal trend that animates a law. *See* Americans United Br. 28 n.76 (quoting *United States v. O'Brien,* 391 U.S. 367, 384 (1968)). But individual statements may serve to confirm the existence of those motivating trends *when combined* with other competent evidence. *See Church of Lukumi Babalu Aye v. Hialeah,* 508 U.S. 520, 540 (1993) ("Relevant evidence [for determining the object of a law] includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the

enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.") (citing *Arlington Heights v. Metro. Housing Devel. Corp.*, 429 U.S. 252, 267-68 (1977)). But the Brief has it exactly backwards: it diminishes hostile remarks when they comport with other evidence of broader trends and motives, but highlights remarks (or their absence) when other evidence points in the opposite direction.

For example, in discussing the purpose of Washington State's Blaine Amendment, the Brief discounts as meaningless the fact that Senator Blair argued for the federal Enabling Act's requirement that state constitutions guarantee "public schools . . . free from sectarian control," in part because the requirement would accomplish the purposes of the failed federal Blaine Amendment. *See* 20 CONG. REC. 2100-01 (Feb. 20, 1889) (statement of Sen. Blair) (praising failed Blaine Amendment and discussing the importance of preserving "nonsectarian" Protestantism in the common schools, while excluding "sectarian" doctrine). In isolation, this statement might well be meaningless. In context, however, it is telling, because it resonates with so much *other evidence* linking the Enabling Act and the consequent Washington Blaine Amendment to the original federal amendment and its purposes.

At the same time, the Brief emphasizes that that there were no recorded comments of individuals expressing particular hostility toward Catholics in the state-level debates over the Washington Blaine Amendment. Americans United Br. 29-30. If, as the Brief correctly notes elsewhere, *id.* at 28 n.76, such comments are of little value standing alone, their absence should be equally insignificant.[14] Their absence bears even less meaning in this case, because no remarks from the Constitutional Convention of 1889 were officially recorded, as the Brief also recognizes elsewhere. *Id.* at 28. In any event, the presence or absence of comments by legislators makes little difference in the face of substantial *other evidence,* discussed above, indicating that Washington's Blaine Amendment, like so many

[14] The Brief similarly emphasizes the absence of hostile remarks by framers of the Wisconsin and Oregon constitutions. *See* Americans United Br. at 16. That silence is meaningless as well.

others, was passed out of the same preference for "nonsectarian" Protestantism over "sectarian" Catholicism.

3. *Amici's* Competing Account Emphasizes Motives That Did Not Significantly Animate the Federal and State Blaine Amendments.

In order to diminish the predominant nativist purpose of the federal Blaine Amendment, its forerunners, and its progeny, the Brief attempts to attribute additional legislative purposes to these laws. These attempts fail.

The first additional motive is what the Brief describes generally as the "no-funding principle," which it associates with Thomas Jefferson and James Madison. Americans United Br. at 5-8. But what primarily concerned Jefferson, Madison, and others at the time was the practice of forced tithes, of "religious taxes," *id.* at 7, collected especially to support churches and their ministries. *See* HAMBURGER, at 9-10 (dissenters who shaped First Amendment sought to eliminate "state laws that, most notably, gave government salaries to ministers on account of their religion."). Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 916 (1986) ("The substantial political resistance to establishment focused on tax support for churches."). This is *not* the principle reflected in the federal and state Blaine Amendments: they targeted only "sectarian" religious schools for exclusion from government funding, precisely so that "nonsectarian" religious schools could still receive those funds. Notably, the Brief does not argue – nor could it – that either Jefferson or Madison advocated the special exclusion of religious schools – least of all schools of particularly disfavored denominations – from government funds allocated for general education.[15]

[15] Indeed, recent scholarship has explained how the framers' concern to avoid such religious assessments, and other legitimate separationist concerns, were later perverted and invoked to serve various nativist purposes, especially opposition to Catholic education. *See, e.g.*, HAMBURGER, at 480 ("Separation became a substantial part of American conceptions of religious liberty only in the nineteenth and twentieth centuries, when Americans felt growing fears of churches, especially the Catholic church."), VITERITTI, at 153 ("[Blaine's] name would live in

The Brief emphasizes that, in 1825, the first "sectarian" school to be excluded from public educational funding in New York City was Baptist, not Catholic. Americans United Br. 9-12; *see* RAVITCH, at 20-21. That does not alter the fact that, at the time of this denial, the Free School Society continued funding its "nonsectarian" schools, which touted a curriculum including "the fundamental principles of the Christian religion, free from all sectarian bias." Americans United Br. 9. At a minimum, then, denying the Baptist school cannot fairly be said to serve the benign "no funding" principle that the Brief would ascribe to the Blaine Amendments. Nor does an initial denial to Baptists change the fact that, once Catholic immigrants started flooding into the City a few years later, the "sectarian" schools became overwhelmingly Catholic, and the term came to be identified with them. *See supra* at 9-10 (noting that "sectarian" and "nonsectarian" initially distinguished among Protestant denominations until wave of Catholic immigration).

The Brief also suggests that the Know-Nothings' rise to political dominance in Massachusetts in 1854 reflected no broader trend and had no spillover effects into other states or their laws. *See* Americans United Br. 14-18. *But see* VITERITTI, at 150 ("The ugly experience in Massachusetts signaled an erupting national mood."); Laycock, 27 WM. & MARY L. REV. at 918 ("The anti-Catholic, anti-immigrant Know Nothing Party would sweep elections in eight states."). Strangely, the Brief cites in support a series of unspecified constitutional amendments that were passed within about five years of that watershed event, and suggests no other reason why these states would change their fundamental law on this particular issue within that time-frame.[16] Americans United Br. 15. *See also* MCGREEVY at

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perpetuity as a symbol of the irony and hypocrisy that characterized much future debate over aid to religious schools: employing constitutional language, invoking patriotic images, appealing to claims of individual rights. All these ploys would serve to disguise the real business that was at hand: undermining the viability of schools run by religious minorities to prop up and perpetuate a publicly supported monopoly of government-run schools.").

[16] The Brief claims that Michigan's 1835 amendment "served as the model" for these other states, *id.* at 15, but does not attempt to explain why they decided to adopt similar provisions one or two decades later, just as Catholic immigration was increasing, and just as the Know-Nothings reached their peak in Massachusetts.

40 (noting that, by 1852, "legislators in almost every state with a significant Catholic population – including Massachusetts, Kentucky, Pennsylvania, Ohio, Michigan, New York – were embroiled in fights over whether to aid Catholic schools or eliminate the King James Bible and Protestant hymns from the common schools."); VITERITTI, at 151 (noting that, by mid-century, Catholics were lobbying for equal treatment in education in several states including, among others, Illinois, Michigan, Minnesota, Ohio and California).

But even if a few *earlier* amendments in some states were somehow isolated from the trend typified by the Know-Nothings in Massachusetts, *later* laws were more explicit in targeting "sectarian" education for disfavor. *See, e.g.,* MINN. CONST. art. XIII, § 2 (1857) ("Prohibition As To Aiding Sectarian School. In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught."); WIS. CONST. art. X, § 3 (1848) (establishing public schools and prohibiting only "sectarian" instruction therein). *See also* JORGENSON, at 187-204 (describing anti-parochial school legislation of 1889 in Illinois and Wisconsin based on recently failed attempts in Massachusetts); *id.* at 205-15 (describing similar Oregon legislation of 1922 that was struck down in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925)).

Regarding the federal Blaine Amendment itself, the Brief emphasizes that concerns about federalism were expressed in the legislative debates. Americans United Br. at 24-25. But federalism was not an additional motive for *passing* the Blaine Amendment, it was a reason to *reject* it. *See id.* at 26. And, of course, the Brief ignores the conclusion of other scholars, supported by numerous examples, that "[n]ativistic appeals and accusations marked the congressional debate over the Blaine Amendment," and that "[w]ithout expressly identifying any wrongful sectarian instruction, the ensuing debate repeatedly focused on the divisiveness of separate schools for Roman Catholics." Utter & Larson, 15 HASTINGS CONST. L.Q. at 465-66; *see* MCGREEVY, at 93 (documenting expressions of hostility to Catholicism in debates surrounding federal Blaine Amendment).

In sum, the Brief fails to provide sufficient reason for this

Court to depart from the historical conclusions of seven of its Justices. The Brief suffers from several grave omissions; it treats evidence of individual remarks inconsistently; and it is unpersuasive in suggesting additional motives for the Blaine Amendments.

II. RELIGION-BASED HOSTILITY AND FEAR ARE NOT LEGITIMATE BASES FOR GOVERNMENT ACTION.

Another group of *amici* acknowledges that anti-Catholic fears fueled the movement for the Blaine Amendments, but argues instead that at least some of those fears were "legitimate." Brief *Amici Curiae* of the American Jewish Congress, *et al.* at 25-30 (hereinafter "AJCongress Brief"). This argument, too, should be rejected.

A. Even if It Were Not So Badly Distorted, the Account by Certain *Amici* of Nineteenth Century Catholic Beliefs Has No Place in the Decision-Making of This Court.

The AJCongress Brief argues that, although "raw anti-Catholicism" played a significant role in the Blaine Amendments, it was not a "but for" cause of those laws, because other, more respectable forms of anti-Catholicism were motivating factors as well. *Id.* at 26. On this account, the Blaine Amendments "were undertaken in response to positions of the Catholic Church as authoritatively enunciated by consecutive Popes in well publicized encyclicals," prompting "a legitimate fear" of Catholic domination. *Id.* at 26-27.

Thus, these *amici* ask the Court to deem "legitimate" the opposition to certain (alleged) Catholic doctrines. But this Court may not legitimize opposition to those doctrines any more than it may condemn the doctrines itself. *See Employment Division v. Smith*, 494 U.S. 872, 887 (1990) (noting "the unacceptable 'business of evaluating the relative merits of differing religious claims.'"); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, ..."); *Watson v. Jones*, 80 U.S. 679, 728

(1871) ("The law knows no heresy, ..."). This is dangerous constitutional territory that this Court should avoid entirely.

One way to avoid this issue is to reject its dubious factual premises. The argument depends on the claim that most anti-Catholic support for Blaine Amendments came not from the "raw" or "crude" bigots, *id.* at 29, 30, but from non-Catholic Americans who assiduously followed the latest in Vatican pronouncements.[17] *See id.* at 27-28. Notably, *amici* offer no evidence on the relative proportions of each type of anti-Catholic supporter of Blaine Amendments. Although anti-Catholicism in the United States hardly originated in the latter half of the 19th Century,[18] its intensification at that time is much more plausibly explained by waves of Catholic immigration than by whatever few Protestants may have read more encyclicals than most Catholics.

But even if the Court were willing to address the question, it should reject the claim that anti-Catholic fears and hostility

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[17] It is difficult to imagine a doctrinal future for any legal distinction between "raw" or "crude" hostility to religious belief, and whatever "legitimate" form the AJCongress Brief envisions. In any event, such a subjective and unworkable distinction has no doctrinal past. This Court has refused to distinguish "good" government hostility to religion and "bad" government hostility to religion, but instead has condemned them all. *See Lukumi*, 508 U.S. at 532 ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."). Similarly, this Court has stated – without further differentiation – that "mere negative attitudes, or fear," are not legitimate bases for government action. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

[18] RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM 1 (1938) ("Hatred of Catholics and foreigners had been steadily growing in the United States for more than two centuries before it took political form with the Native American outburst of the 1840s and the Know-Nothingism of the 1850s. These upheavals could never have occurred had not the American people been so steeped in antipapal prejudice that they were unable to resist the nativistic forces of their day."); MARTY, at 45-47 (discussing role of Historian John Foxe's *Book of Martyrs* in "fir[ing] the anti-Catholic spirit that the English needed to spur them to mission and conquest" in the new world in the 16th Century).

prompting the Blaine Amendments were "legitimate." American Protestants did *indeed* take Vatican pronouncements, like the Syllabus of Errors, *See* Encyclical Letter of His Holiness Pope Pius IX, *Quanta Cura* (1864), out of context, for they were *indeed* directed at the radical anti-clericalism that characterized the recent European revolutions – not at the United States. *See* MCGREEVY, at 21, 37, 96-98. *See also* JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 67 (1960) (distinguishing American constitutionalism "sharply . . . from the system against which the Church waged its long-drawn-out fight in the nineteenth century, namely, Jacobinism, ..."). American Catholics promulgated and insisted on this interpretation of the documents of their own Church, as *amici* seem to acknowledge, but that interpretation was widely rejected by a relentlessly suspicious audience.[19] Moreover, none of these Vatican documents altered the consistent pattern of behavior of American Catholics to seek *only equal treatment*, in educational funding and elsewhere. *See, e.g.,* Orestes Brownson, *The Know-Nothings,* BROWNSON'S QUARTERLY REVIEW 117 (Jan. 1855) ("[The Church's] wish is to pursue her spiritual mission in peace, and keep aloof from politics, so long as they leave her the opportunity."). Nonetheless, *amici* would have this Court deem "legitimate" the sweeping conclusion of Blaine Amendment supporters that "the Catholic Church sought exclusive political power, and that, if it could, it would establish itself as the sole official church." AJ Congress Br. at 27. If addressed at all, this

[19] *Amici* note with particular dismay that the AJCongress Brief itself *still* refuses to accept as authoritative 19th Century American Catholics' interpretation of their own Church's documents, describing it instead as an "effort[] to explain away the Syllabus and the encyclicals." AJCongress Br. at 28. Similarly, the Brief suggests that American Catholics' interpretation reflected that they did not take the teachings of the Pope seriously. *Id.* at 29 ("Defenders of the existing order were legitimately entitled to forestall the possibility that, contrary to the protestations of American Catholics, the Church's authoritative spiritual leader was to be taken seriously; . . . ."). As it turns out, 19th Century American Catholics did a better job interpreting Vatican documents than their contemporary detractors. *See* VAT. II, *Dignitatis Humanae* (Declaration on Religious Freedom) § 3 (1965) ("In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in a manner contrary to his conscience.").

claim should be rejected.

B. The Fact That a Group Adheres to a Set of Unpopular Religious Beliefs May Not Serve as the Basis for Excluding That Group from Government Benefits.

Even if this Court were competent to engage in the evaluation of doctrine invited by the AJCongress Brief – and even if that Brief's account of Catholic doctrine of the late 19th Century were factually and theologically accurate – allegedly legitimate fears of Catholic *doctrine* still cannot justify the exclusion of Catholic *people and groups* from government benefits. *See Romer* v. *Evans,* 517 U.S. 620, 634 (1996) ("'a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'") (quoting *Dept. of Agriculture* v. *Moreno,* 413 U.S. 528, 534 (1973)).

In other words, the Blaine Amendments were not a *mere declaration* that a particular Catholic doctrine was incorrect, un-American, or otherwise disfavored by a majority. (To be sure, that would be constitutionally problematic for different reasons, but that is not the issue here.) Instead, the Blaine Amendments were designed to (and still do) *impose special legal disadvantages* on Catholics because their beliefs were feared or hated by a sufficient majority. *Lukumi,* 508 U.S. at 533 (quoting *Smith,* 494 U.S. at 877). The government may not exclude Catholics from educational funding because a majority harbors fear or hostility toward their beliefs, any more than it may exclude Jews or Muslims from food stamp programs or garbage pick-up because a majority harbors fear or hostility toward their beliefs. *See Palmore v. Sidoti,* 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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